

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	File No. EB-02-PA-118
)	
WOYK, Inc.)	NAL/Acct. No. 200232400005
WOYK(AM))	
York, PA)	FRN 0005-0231-06

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2003

Released: July 22, 2003

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order* (“*Order*”), we cancel a proposed monetary forfeiture in the amount of seven thousand dollars (\$7,000), issued to WOYK, Inc., (“WOYK”), licensee of Station WOYK(AM), for its apparent willful violation of Section 73.49 of the Commission’s Rules (“Rules”).¹ The noted violation involves WOYK’s apparent failure to maintain an adequate tower fence enclosure.

2. On July 17, 2002, the Commission’s Philadelphia, Pennsylvania Field Office (“Philadelphia Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”) in the amount of seven thousand dollars (\$7,000) to WOYK for the noted violation.²

II. BACKGROUND

3. On March 8, 2002, an agent from the Philadelphia Office inspected the three-tower array of WOYK(AM) in York, Pennsylvania. The agent observed that the middle tower (antenna structure registration number 1029250) was not enclosed within an effective locked fence. The agent determined that the middle tower could be accessed through an opening in the fence created when a portion of the fence fell off a warped fence post.

4. On July 17, 2002, the Philadelphia Office issued a *NAL* in the amount of \$7,000 to WOYK for failure to maintain an adequate tower fence enclosure in willful violation of Section 73.49 of the Rules. In its response to the *NAL*, WOYK requests rescission or reduction of the proposed forfeiture amount. The licensee asserts that the fence is a five to six foot wooden stockade, and consists of sections nailed to fence posts at the top, middle, and bottom. According to the licensee, the fence section at issue did not fall off the fence post, but rather was secured to the middle and bottom of the fence post and only fell away from the top of the fence post creating a gap of approximately six to twelve inches in the fence. Furthermore, WOYK asserts that because only the top portion of the fence section fell away, it would have been virtually impossible for anyone to access the tower without either breaking down the fence or

¹ 47 C.F.R. § 73.49.

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200232400005 (Enf. Bur., Philadelphia Office, released July 17, 2002).

climbing over it. WOYK states that it repaired the fence by securing the top of the fence section to the fence post in the same manner as it was at the middle and bottom. The response is supported by a declaration from WOYK's president submitted under penalty of perjury.

5. WOYK states that the fence was repaired less than 24 hours after it was notified that the fence needed repair. Further, WOYK contends that because the Philadelphia Office did not send it a *Notice of Violation* regarding this matter, it never had an opportunity, pursuant to Section 503(b)(2)(D) of the Communications Act of 1934 as amended³ ("Act"), to speak to the nature, circumstances, extent or gravity of the violation. WOYK also contends that although the base forfeiture amount for a violation of AM tower fencing is \$7,000, this is not a situation in which the licensee had no fence or a partial fence. WOYK argues that in this case, the violation was minor in that there was a slight gap in the fence which was almost immediately repaired and posed no danger to the public or the environment. The licensee also claims that during the inspection, the agent only mentioned the fence "in passing" and never inquired again about the fence or returned to the station to reinspect the fence. For these reasons, the licensee contends that the forfeiture should be rescinded or reduced.

III. DISCUSSION

6. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999). In examining WOYK's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶

7. Section 73.49 of the Rules states that antenna towers having radio frequency potential at the base "must be enclosed within effective locked fences or other enclosures."⁷ WOYK submitted a signed declaration from its president, who repaired the fence, stating that the fence section at issue is generally secured to the fence post at the top, middle, and bottom, and that the fence section referred to in the *NAL* only fell away from the top, creating a six to twelve inch gap, but that the fence section remained secured to the fence post at the middle and bottom. WOYK admits that the fence may have been in some minor disrepair but argues that it would have been virtually impossible to access the tower without climbing over the fence or breaking it down. After reviewing the record before us, we conclude that there is not enough evidence to support a finding that WOYK failed to maintain an effective locked fence in violation of Section 73.49. Consequently, we cancel the *NAL*.⁸

³ 47 U.S.C. § 503(b)(2)(D).

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ 47 C.F.R. § 73.49.

⁸ In light of our finding above, we need not reach a determination on WOYK's remaining arguments; however, in response to WOYK's argument that it had no opportunity to address the nature, circumstances, extent or gravity of the violation prior to the issuance of the *NAL*, we note that neither Section 503(b) of the Act nor Section 1.80 of the Rules require the Commission to issue a Notice of Violation prior to the issuance of a *NAL*. Moreover, consistent with Section 1.80(f)(3) of the Rules WOYK has been afforded an opportunity to submit a response to the *NAL* addressing the nature, circumstances, extent or gravity of the violation, which it has done.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 504(b) of the Act,⁹ and Sections 0.111, 0.311, and 1.80(f)(4) of the Rules,¹⁰ the forfeiture in the amount of seven thousand dollars (\$7,000) proposed in the July 17, 2002 *NAL* issued to WOYK for failure to maintain an adequate tower fence enclosure **IS CANCELLED**.

9. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail, Return Receipt Requested, to WOYK, Inc., 1360 Copenhaffer Road, York, Pennsylvania, 17404, and to its counsel, Allan G. Moskowitz, Esq., Kaye Scholer LLP, The McPherson Building, 901 Fifteenth Street, NW, Washington DC 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁹ 47 U.S.C. § 504(b)

¹⁰ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).